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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 635

HERBERT TIGNER, *Appellant*,

v.

THE STATE OF TEXAS

Appeal From the Court of Criminal Appeals of the State of Texas

BRIEF FOR APPELLANT

WILLIAM A. VINSON,
CHARLES I. FRANCIS,
Attorneys for Herbert Tigner, Appellant,
Eleventh Floor, Esperson Building,
Houston, Texas

Of Counsel:
VINSON, ELKINS, WEEMS & FRANCIS,
Esperson Building, Houston, Texas

GILLESPIE-ALPHA CO., HOUSTON

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Appeal From the Court of Criminal Appeals of the State of Texas

BRIEF FOR APPELLANT

Opinions Below

The opinion of the Court of Criminal Appeals (R. 11) is reported in 132 S.W. (2d) 885. The opinion on motion for rehearing (R. 33) is reported in 132 S.W. (2d) 897.

Jurisdiction

The judgment of the Court of Criminal Appeals became final on November 15, 1939, upon the overruling of appel-

lant's motion for rehearing (R. 35). The petition for appeal was filed in the Court of Criminal Appeals of Texas on December 12, 1939 (R. 35), and was allowed by F. L. HAWKINS, Presiding Judge of the Court of Criminal Appeals of Texas, on December 12, 1939 (R. 40). Thereafter, on January 11, 1940, appellant filed in the Supreme Court of the United States a transcript of the record, and separately presented a Statement as to Jurisdiction; and on January 29, 1940, an order was entered in this Court noting probable jurisdiction.

The jurisdiction of this Court is invoked under Section 237(a) of the JUDICIAL CODE, as amended (28 U.S.C.A. 344).

Statement of the Case

An indictment was returned in the Criminal District Court No. 2 of Harris County, Texas, charging appellant with the felony offense of entering into a conspiracy to fix the retail price of beer in violation of the provisions of Chapter 3, Title 19, PENAL CODE OF THE STATE OF TEXAS, 1925. After his arrest and incarceration, he presented a petition to the judge of said court praying for a writ of habeas corpus, contending that the indictment was void because the statute upon which it was predicated was repugnant to Section 1 of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES in that it exempted from its operation "agricultural products and livestock while in the hands of the producer or raiser." At the hearing, appellant was remanded to the custody of the sheriff of Harris County, Texas, to await trial upon the indictment. He prosecuted an appeal to the Court of Criminal Appeals of Texas, the court of last resort in criminal cases, where the judgment of the District Court was affirmed on June 23, 1939. Appellant's motion for re-

hearing was overruled by the Court of Criminal Appeals on November 15, 1939, and the judgment became final on said date.

Question Presented

This appeal presents the single question whether Chapter 3, Title 19 of the PENAL CODE OF THE STATE OF TEXAS, 1925 (the criminal antitrust statute) deprives appellant of his liberty without due process of law and denies to him the equal protection of the laws guaranteed by Section 1 of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES by reason of the exemption of "agricultural products and livestock while in the hands of the producer or raiser."

The decision of the Court of Criminal Appeals was in favor of its validity, contrary to the decision of this Court in CONNOLLY v. UNION SEWER PIPE COMPANY, 184 U.S. 540, 46 L. Ed. 679, which involved a statute of the State of Illinois (Act of July 1, 1893, copied at length in the opinion), which in essential respects is the same as the Texas statute now under review.

Statute Involved

The statute, which is a part of the Penal Code of 1925, is set out at length in the original opinion of the Court of Criminal Appeals (R. 12-17), but the pertinent portions thereof are as follows:

> "Article 1632. A 'trust' is a combination of capital, skill, or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for any or all of the following purposes * * *
>
> 2. To fix, maintain, increase or reduce the price of merchandise, produce, or commodities, or the cost of in-

surance, or of the preparation of any product for market or transportation."

"Article 1635. Whoever violates any provision of this chapter shall be confined in the penitentiary not less than two nor more than ten years."

"Article 1637. If any person shall enter into an agreement or understanding of any character to form a trust, or to form a monopoly, or to form a conspiracy in restraint of trade, as these offenses are defined in this chapter, or shall form a trust, monopoly or conspiracy in restraint of trade, or shall be a party to the formation of a trust or monopoly or conspiracy in restraint of trade, or shall become a party to a trust or monopoly or conspiracy in restraint of trade, or shall do any act in furtherance of or aid to such trust or monopoly or conspiracy in restraint of trade, he shall be confined to the penitentiary not less than two nor more than ten years."

"Article 1642. NO PROVISION OF THIS LAW SHALL APPLY TO AGRICULTURAL PRODUCTS OR LIVESTOCK WHILE IN THE HANDS OF THE PRODUCER OR RAISER." * * *

History of the Statute

The pertinent legislative and judicial history of the several Antitrust Acts of Texas may be briefly summarized as follows:

The first statute was enacted in 1889 [1] (Acts of the Twenty-First Legislature, Ch. 117, p. 141). It exempted "agricultural products or livestock while in the hands of the pro-

[1]The Texas law was among the first passed by the various States, being preceded only by the Maine Law approved March 2, 1889, and the Kansas Law approved March 12, 1889. The Texas Act became effective April 30, 1889. The Illinois Act, approved July 1, 1893, copied from the Texas Act, was held unconstitutional in Connolly v. Union Sewer Pipe Company, 184 U.S. 540. The Texas statute had previously been held unconstitutional in In re Grice, 79 Fed. 627. The exemption clauses in the Illinois and Texas Acts are identical. Similar exemption clauses were included in many other State statutes, such as Georgia, declared unconstitutional in Brown v. Jacobs Pharmacy, 41 S.E. 553, and Montana, declared unconstitutional in State v. Cudahay Packing Company, 82 Pac. 833.

ducer or raiser."[2] It was amended by an Act approved April 30, 1895, but the Amended Act carried the same exemptions as the Act of 1889, and in addition exempted laborers organized "for the purpose of maintaining any standard of wages." The Act of April 30, 1895, along with certain provisions of the Act of 1889, were made a part of the REVISED CIVIL STATUTES OF 1895, Articles 5313 to 5321a, and also a part of the Penal Code of 1895, Articles 976 to 988d.

The exemption of "livestock and agricultural products" appears in the REVISED CIVIL STATUTES OF 1895, as Article 5320, and in the PENAL CODE OF 1895, as Article 988.[3]

In 1899 (Acts of 1899, p. 246) the Legislature of Texas again amended the Antitrust Law. Such is known as the Antitrust Law of 1899 (Laws of the Twenty-Sixth Legislature, p. 246). Section 14 of this law provided that "this Act shall be held and construed to be cumulative to all laws now in force in this State." However, the State courts, in construing this statute, held that the provision to the effect that it was "cumulative" of all laws "now in force" did not revive and make part of it, the arbitrary exemption provisions of the unconstitutional Act of 1895 and the Codes of 1895; that these two laws, enacted four years apart, did not constitute "one and the same law." See STATE v. LAREDO ICE COMPANY, 96 Tex. 461, 466, and the opinion of CHIEF JUSTICE FISHER in STATE v. SHIPPERS COMPRESS AND WAREHOUSE COMPANY, 67 S.W. 1049, 1056. This construction of the State statute was adopted and applied in NATIONAL COTTON OIL

[2]The 1889 statute is set out in the case of Queen Insurance Company, et al., v. The State of Texas, 86 Tex. 250 (1893), wherein the Supreme Court, after pointing out certain defects in the Act, decided that it did not embrace the business of insurance. This decision lead to the subsequent amendments made in 1895.

[3]The 1895 statutes are set out in Waters-Pierce Oil Co. v. State, 19 T.C.A. 1, 44 S.W. 936 (1898), decided prior to the Connolly case (1902).

COMPANY v. TEXAS, 197 U.S. 115, 132, 133. A separate Act (Act of 1899, p. 262) was also passed by the Twenty-Sixth Legislature of Texas, authorizing "all persons engaged in any kind of work or labor, manual or mental, or both, to associate themselves together and form trade unions and other organizations," for the purpose of improving working conditions, and providing that their activities should not be unlawful. This act was declared valid in WATERS-PIERCE OIL COMPANY v. STATE, 106 S.W. 918, 929. In changed form the Act now appears in the REVISED STATUTES OF 1925 as Articles 5152-5154, inclusive, and in the REVISED CRIMINAL STATUTES OF 1925 as Articles 1642 to 1644, inclusive.

In 1902 this Court held the Illinois Antitrust Act, which was a copy of the 1889 Texas Act, unconstitutional because of the exemption of agricultural products and livestock. CONNOLLY v. UNION SEWER PIPE COMPANY, 184 U.S. 540. Thereafter (June, 1902) the Supreme Court of Texas, following the law as announced by the Supreme Court of the United States in the CONNOLLY case, held the Texas Law of 1895 unconstitutional because of the aforesaid exemption. STATE v. SHIPPERS COMPRESS AND WAREHOUSE COMPANY, 95 Tex. 603, 69 S.W. 58.

This was the state of the record on trust legislation until the Legislature adopted the Act of 1903 (General Laws, p. 119). This Act, approved March 31, 1903, recited as an emergency the fact that the Antitrust Laws had been held to be unconstitutional, undoubtedly referring to the CONNOLLY case decided by the United States Supreme Court on March 10, 1902. It specially repealed, eo nomine, all previous acts on the subject of trusts, except the Exemption Act of 1899 (General Laws, 1899, p. 262). The Antitrust Act of 1903 contained no exemption, and, while repealing previous legislation, except the Exemption Act of 1899, undertook to pre-

serve all prior accrued penalties and forfeitures for violations of the repealed Acts.[4]

In 1907 another Act on the subject of trusts was passed but it is almost entirely procedural (General Laws of 1907, p. 456). In the same year the Legislature of Texas also passed a law authorizing a revision of the Revised Statutes, details of which are unnecessary to state.

In 1909 another Act was passed on the subject of revision (General Laws, p. 130). For the purpose of this brief it is unnecessary to note the details of that Act. A revision of the statutes under these Acts, however, resulted in the Antitrust Law then existing being placed in the REVISED CIVIL STATUTES OF TEXAS, commencing with Article 7796, which, with the balance of the revision, was embodied in the bill which was duly adopted by the Legislature. In the final title, Section 16 provided that: "The provisions of the REVISED STATUTES, so far as they are substantially the same as the Statutes of this State in force at the time when the REVISED STATUTES shall go into effect, or as the common law in force in this State at said time, shall be construed as continuations thereof, and not as new enactments of same." In the REVISED CIVIL STATUTES OF 1911, this Exemption Act of 1899, relating to labor unions, appears as Articles 5244 to 5246, but in the REVISED CIVIL STATUTES OF 1911 no exemption was given to agricultural products and livestock "while in the hands of the producer or raiser." The same Commission, however, prepared and submitted, and the same Legislature adopted the revision of the PENAL CODE and CODE OF CRIMINAL PROCEDURE. The antitrust provisions contained in the PENAL CODE were in substance and effect the same as the prohibitions contained in the

[4]The history of the Act and subsequent antitrust legislation in Texas will be found in State v. Standard Oil Co., et al., 82 S.W. (2d) 402 (1935). This decision was reversed by the Supreme Court of Texas (103 T. 313, 107 S.W. (2d) 550), but the history of antitrust legislation in Texas, set forth in the opinion, is accurate and informative.

REVISED CIVIL STATUTES, except that Article 1477 of the PENAL CODE exempted "agricultural products or livestock while in the hands of the producer or raiser."

After the adoption of the REVISED STATUTES OF 1911, there was no further trust legislation of any importance which affects the question under immediate consideration until the adoption of the REVISED STATUTES OF 1925. In 1923 (General Laws, p. 338) the Legislature passed an act providing for another revision of the laws of the State of Texas. For the first time in the history of such Commissions, the Governor was required to appoint persons who had the qualifications of Judges of the Supreme Court. Among other things it was provided, as to said Commissioners:

> * * * "They shall harmonize conflicting statutes, or parts thereof, by rewriting, omissions, or additions, and shall generally make such changes, additions or omissions as they may deem necessary to reduce in volume the general statutes of the State and make them harmonious, plain, concise and *complete*."

This Commission presented to the Legislature a report along with the Revised Statutes prepared as a bill. The report declared:

> "We have omitted from the revision all obsolete statutes and those declared unconstitutional and void, by our Supreme Court and by the Supreme Court of the United States."

And again, on page 2 of the report:

> "We have arranged the laws relating to labor, both the civil and criminal, under separate titles, in each case plainly stating the law so as to effect its object and give the intended protection to those in whose behalf the laws were created."

And again, on page 3 of the report:

> "The laws relating to agriculture, including the marketing of agricultural products and those relating to warehouses, weighers, etc., have been carefully revised and codified."

Thus we see nothing was done by "inadvertence or mistake." The whole work of revision was the deliberate judgment of the Commission.

Under Title 126 of the REVISED CIVIL STATUTES, 1925, on the subject of trusts, monopolies, and conspiracies against trade, beginning with Article 7426, we find that Article 7426 is a literal copy of Article 7796 of the REVISED CIVIL STATUTES OF 1911; Article 7427 is a copy of Article 7797; Article 7428 is a copy of Article 7798; Article 7429 is a copy of Article 7799; Article 7430 is substantially Article 7800; and thence on through, including the procedural provisions, there are no substantial changes in the two. There is no exemption as to agricultural products and livestock *in the* CIVIL STATUTES OF 1911 and *none in the* CIVIL STATUTES OF 1925.

The revision of the Penal Code, however, presents some very different aspects; it is not a copy of the chapters on the same subject, taken from the PENAL CODE OF 1911, but shows a careful and complete revision of the laws which is obviously the judgment of the Commission based on mature consideration, and can in no sense be considered *inadvertent*. Chapter 3 of Title 19 of the PENAL CODE OF 1925, takes up the so-called "antitrust laws" in the same manner in which they are handled in the Civil Statutes. Article 1632 is a copy of Article 7426 REVISED STATUTES; Article 1633 is a copy of Article 7427; Article 1634 is a copy of Article 7428; the extended procedural provisions of the Civil Statutes are materially reduced in the Penal Code. Much of the contents of the PENAL CODE, 1911, is omitted, much more is changed, edited and rearranged, and the exemptions are carefully rewritten.

Article 1642 of the PENAL CODE, 1925, provides:

> "No provision of *this law* shall apply to agricultural products or livestock while in the hands of the producer or raiser. It shall be lawful for any person engaged in any kind of work or labor, manual or mental, or both, to associate with other such persons to form trades unions and other organizations for the purpose of protecting themselves in their personal work, personal labor, and personal service, in their respective pursuits and employments." (Italics ours.)

Article 1643 exempts trades unions. The general repealing clause of the PENAL CODE, 1925, declared that "all laws and parts of laws relating to crime omitted from this Act *have been intentionally omitted,* and *all additions have been intentionally added;* and this Act shall be construed to be *an independent Act of the Legislature,* enacted under the caption hereof and the articles contained in this Act as rewritten, changed, combined, and codified, *shall not be construed as a continuation of former laws,* except as otherwise herein provided." (Italics ours.) This is the direct antithesis of the final title to 1911, supra, and is conclusive in determining the legislative intent as to the 1925 revision.

This declaration of legislative intent left nothing to construction. The Legislature says it has left nothing to chance or inadvertence; what it has said it has deliberately said as an expression of its judgment, and if there be any mistake it is a mistake of judgment.

With reference to the matter immediately under discussion, the declaration that all *"additions were intentionally made and all omissions intentionally omitted,"* shows the closest scrutiny on the part of the codifiers with reference to the exemptions under consideration. An analysis of the statutes is most convincing of the verity of the Commission's declaration of deliberate consideration of all changes made.

Article 1642 of the PENAL CODE OF 1925 is not an exact copy of Article 1477, PENAL CODE, 1911, but shows conclusively a careful and painstaking consideration on the part of the codifiers, and shows that so far as the Commission was concerned there was no lack of consideration of the subject matter. The same is true with reference to Article 1643, PENAL CODE, which is not a copy of Article 1478 in the CODE OF 1911, nor is Article 1644 a copy of Article 1479 in the CODE OF 1911. The three Articles in the CODE OF 1925 show careful and painstaking consideration and show that the Legislature in declaring changes to be intentionally made, and not lapses, not inadvertences, nor unconscious changes, was fully aware of the changes made; and as to the particular articles under consideration the most deliberate and careful consideration was given to each of them.[5]

The effect of the revision of the State statutes was fully discussed by CHIEF JUSTICE CURETON in AMERICAN INDEMNITY COMPANY v. CITY OF AUSTIN, 246 S.W. 1019, 1025, where he said:

> "But the Revised Statutes, as we have seen, are the law, and are to be looked to with safety and confidence by the citizen * * * "

See also STEVENS v. STATE, 70 Tex. Cr. R. 565, 159 S.W. 505; LONG v. STATE, 3 S.W. (2d) 448; and JOHNSON v. STATE, 283 S.W. 807, to the same effect.

The Supreme Court of Texas in the case of STATE v. STAND-

[5]Article 1, Section 3 of the Act of the Legislature adopting the Penal Code and the Code of Criminal Procedure of Texas, 1925, expressly repeals all penal laws not embraced in the Act, and declares, in the strongest possible language, that all "additions" have been **intentionally** added, and all "omissions" have been **intentionally** omitted, and "this Act shall be construed to be an independent Act of the Legislature enacted under the caption hereof, and the articles contained in this Act, as revised, rewritten, changed, combined and codified shall not be construed as a continuation of former laws, except as otherwise herein provided."

ARD OIL COMPANY, 107 S.W. (2d) 550 (decided June 16, 1937), ruled that the REVISED CIVIL STATUTES and the PENAL CODE, adopted in 1925, are distinct enactments and the validity of one is in no way dependent on the validity of the other. This decision contains a brief history and résumé of the State Antitrust Laws and sustains the validity of the REVISED CIVIL STATUTES OF 1925, which did not contain the agricultural and livestock exemption appearing in the Penal Statutes, the validity of which are challenged in this case.

This appeal presents the first attack upon the Antitrust Statutes embodied in the PENAL CODE OF THE STATE OF TEXAS, 1925, on the ground of their inequality under the FOURTEENTH AMENDMENT.

Specifications of Error to Be Urged

(1)—Chapter 3, Title 19, PENAL CODE OF THE STATE OF TEXAS, 1925, defining trusts, monopolies and conspiracies in restraint of trade, is unconstitutional and void as repugnant to Section 1 of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, because, by reason of the exemption from its operation and the pains and penalties therein prescribed of "agricultural products and livestock while in the hands of the producer or raiser" appellant is denied the equal protection of the State laws (R. 41).

(2)—The Court of Criminal Appeals of Texas erred in refusing to follow the decision of the Supreme Court of the United States in the case of CONNOLLY V. UNION SEWER PIPE COMPANY, 184 U.S. 540, in which it was adjudicated that a statute of the State of Illinois, identical in all essential particulars with the statute of the State of Texas, and which specifically exempted from its operation "agricultural products and livestock while in the hands of the producer or raiser," was unconstitutional as repugnant to the "due process" and "equal protection" clauses of Section 1 of the

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (R. 42).

Summary of Argument

I.

The decision of the Supreme Court of the United States in CONNOLLY v. UNION SEWER PIPE COMPANY, 184 U.S. 540, is decisive of the question involved in the case. *The exemption provision of the Illinois statute was identical* with that contained in Article 1642, Chapter 3, Title 19 of the PENAL CODE OF THE STATE OF TEXAS, 1925, and the same logic which required this Court to invalidate the Illinois statute requires the invalidation of the Texas statute. This decision has been followed by the Supreme Court for thirty-eight years, has been approved many times, and has never been overruled or modified.

II.

The decisions referred to by the Court of Criminal Appeals of Texas in upholding the challenged statutes do not sustain the Court's conclusion that "in view of the supervening economic conditions since 1902" (the year the CONNOLLY case was decided) the rule of law therein announced by the Supreme Court will not be applied to the *palpable discrimination* which arises by reason of the exemption granted by this law to farmers and stockmen.

III.

When farmers and stockmen are exempt from the prohibitions of a criminal statute which is applicable to appellant, charged with a conspiracy thereunder to fix the price of beer, a *gross discrimination* is created by the State law, contrary to Section 1 of the FOURTEENTH AMENDMENT TO THE UNITED

STATES CONSTITUTION, and such a discrimination cannot be justified on the ground that the State has made a reasonable classification, because it is not based on anything having relation to the purpose for which it is made.

Argument

I.

The case of CONNOLLY v. UNION SEWER PIPE CO., 184 U.S. 540, 46 L. Ed. 679, decided by the Supreme Court of the United States on March 10, 1902, decides the issue involved in this appeal. The opinion in this case was written by MR. JUSTICE HARLAN. All judges participating in the decision of the case were in accord with this opinion, except MR. JUSTICE MCKENNA, who filed a dissenting opinion. No case can be found in the records where the opinion of the court in this case, which for thirty-eight years has been a landmark in constitutional law, has been overruled, modified or limited upon the important question involved therein. A study of subsequent cases discloses that this decision has been cited one hundred forty-two times in opinions written by the United States appellate courts; and in none of these opinions has there been given any intimation that the sound doctrine of constitutional law therein announced should be repudiated. The decision of the Court of Criminal Appeals of Texas in this case is the first decision which counsel have been able to find which challenges the authoritative pronouncements contained in this important decision, which vitalizes the equal protection clause of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, protecting alike the poor and the rich, the weak and the powerful, from the arbitrary action of State Legislatures, when an attempt is made to deny any person the equal protection of the law.

The antitrust statute of the State of Illinois, adopted June

20, 1893, was patterned after the Texas antitrust act, adopted April 20, 1889. Section 9 of this Act (184 U.S. 554) specified:

> "Sec. 9. The provisions of this Act shall not apply to agricultural products or livestock while in the hands of the producer or raiser."

This provision of the Illinois statute, which formed the basis for the court's decision in the CONNOLLY case, is practically identical with Article 1642, Chapter 3, Title 19, PENAL CODE OF THE STATE OF TEXAS, 1925, which reads as follows:

> "Art. 1642. No provision of this law shall apply to agricultural products or live stock while in the hands of the producer or raiser. * * * "

The livestock and agricultural business in the State of Texas constitutes a major enterprise of that State. Millions of dollars are invested in these two important enterprises, and millions of people are employed therein. These industries were major industries in the State of Illinois at the time the CONNOLLY case was decided. The language of the majority opinion in this case constitutes a complete refutation of the opinion of the Court of Criminal Appeals of Texas, wherein it was held that the Texas Act did not violate Section 1 of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. The words used by JUSTICE HARLAN should stand as the law of this country, so long as freemen desire to be protected from arbitrary discriminations made by a transient State legislative majority. The court said:

> "Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it may be observed that if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise, or commodities, whereby such combinations may, for their benefit exclusively, control or establish

prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturalists and live stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the 9th Section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State.

"We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

The binding force and effect of this decision was recognized by the Supreme Court of Texas in the case of STATE v. SHIP-

PERS' COMPRESS & WAREHOUSE CO., 69 S.W. 58, 61 (June 19, 1902), wherein JUSTICE BROWN said:

> "We recognize the superior authority of the Supreme Court of the United States upon this question, and in obedience to its decision we shall hold that, in so far as the law of 1895 comes within the terms of the Connolly case, it is invalid; that it will not support an action by the State to recover a penalty for a violation of the law, nor will it, in suits between corporations or individuals, support a defense based upon the fact that the right of action originated in a violation of the antitrust law."

Appellant, in his conduct as a citizen, should have a right to rely upon the certainty of the criminal law of his State, both the Supreme Court of the United States and the Supreme Court of Texas having declared that such an exemption as that embodied in Article 1642 of the TEXAS PENAL CODE invalidates the statute. He should not be required to answer an indictment charging him with violating a law which has expressly been held to be unconstitutional by decisions of the highest court of the State, as well as by the highest court of his country.

The CONNOLLY case announced no new and novel doctrine. It merely applied the prohibitions of Section 1 of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES to a patent discrimination which was made by the Illinois antitrust statutes. The equal protection clause of the FOURTEENTH AMENDMENT was designed to prevent just exactly that thing which the Illinois Legislature and the Texas Legislature have attempted to accomplish,—gross discrimination without any reason or justification therefor. As was said in the case of BARBIER v. CONNOLLY, 113 U.S. 27, 32, 28 L. Ed. 923, 925, 5 Sup. Ct. Rep. 357, in regard to this section of the FOURTEENTH AMENDMENT:

> "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment."

The same thought was expressed in HAYES v. MISSOURI, 120 U.S. 68, 71, 30 L. Ed. 578, 580, 7 Sup. Ct. Rep. 350, wherein it was said that the FOURTEENTH AMENDMENT:

> "* * * does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

The criminal antitrust statutes of Texas, as embodied in Chapter 3, Title 19, PENAL CODE OF THE STATE OF TEXAS, 1925, do not measure up to this test, nor did the antitrust statutes of the State of Illinois measure up to such requirements. The object of the Texas antitrust laws is to encourage competition and prevent the evils incident to price fixing and other acts expressly forbidden thereby. With this object in mind, the State of Texas makes stock raisers and farmers subject to the civil penalties prescribed by the civil antitrust statutes of Texas (STATE v. STANDARD OIL CO., ET AL., 130 Tex. 313, 107 S.W. (2d) 550). Like all other citizens, they are forbidden to form trusts, monopolies or conspiracies in restraint of trade. The price fixing agreements of farmers, under the civil statutes, are illegal, just as similar contracts made by other citizens. Thus, by the declared policy of its civil statutes, the State of Texas recognizes that *it is undesirable, from the standpoint of the public, to permit monopolies, trusts and conspiracies in restraint of trade by any class of Texas citi-*

zens. Yet, thus recognizing the public evil resulting therefrom, the Legislature of the State of Texas exempts this politically powerful class from the pains and penalties prescribed by the penal statutes of the State for those violating the criminal antitrust statutes, while all other classes of citizens, similarly situated, are subjected to the penalities prescribed by our penal statutes. This Court in BARBIER v. CONNOLLY, supra, speaking unanimously through JUSTICE FIELD, said (113 U.S. 31, 28 L. Ed. 924):

> "The Fourteenth Amendment * * * undoubtedly intended * * * that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

Such a clear and logical statement sounds like common sense as well as good law. Now, what justification in logic or in law can be offered for a State policy which makes an act criminal if committed by a merchant or a manufacturer but not a crime if committed by a ranchman or farmer? It is a matter of common knowledge, of which this court may take judicial notice, that there are many large ranches in the State of Texas. The owners of these ranches may agree that they will not sell their cattle for less than ten cents a pound. This agreement would be a violation of the civil antitrust laws of Texas, and the ranchmen making this agreement, provided the Attorney General of the State of Texas thought it not politically inexpedient, could be subjected to such penalties as are prescribed by the civil antitrust statutes. Articles 7426, 7427, 7428, 7429, 7436, 7437, Title 126, VERNON'S TEXAS CIVIL STATUTES, 1925 (Vol. 20, pages 609-639, incl.). No such suit could be brought against these particular price-fixers except with the consent of the Attorney General of Texas, who is an elected official. No grand jury could indict these ranchmen for a criminal offense, because they are exempt

from prosecution under the criminal antitrust statutes, because of the provisions of Article 1642. Their illegal act is not a crime. The same illegal act committed by a merchant, manufacturer, salesman or other citizen, not a farmer or a ranchman, is a crime. The grand jury in the county wherein this particular price-fixing agreement was made could not indict these ranchmen like appellant, Herbert Tigner, was indicted, because they occupy a favored position by reason of the exemption privileges accorded them by Article 1642; but a grand jury in the same county could indict any other group of citizens in that county who made a similar agreement, such, for example, as this appellant and his associates. The Attorney General of Texas would have no voice in what a grand jury might do with respect to appellant and his associates, because proceedings under the criminal law are not subject to the judgment and discretion of the Attorney General of Texas. But the same grand jury could do nothing with respect to a like price-fixing agreement made by farmers or stockmen, because of the exemption accorded such favored class by Article 1642 of the PENAL CODE; and no action under the civil antitrust statutes could be taken against this favored group for agreeing upon a price for their products, unless the Attorney General of Texas, an elected official of that State, consented that such a suit might be instituted by the State of Texas. (Article 7436, Title 126, VERNON'S TEXAS CIVIL STATUTES, Vol. 20, page 638.) Such a proceeding has never occurred and probably never will occur in Texas. If any sound reason can be advanced for such a legislative descrimination, counsel for appellant have never heard it; and it does not appear from anything that has been said in briefs heretofore filed in this case or in the opinion of any judge who has attempted to justify the unwarranted discrimination created by Article 1642.

The opinion of the Court of Criminal Appeals of Texas,

written by JUDGE CHRISTIAN, says (13[illegible] S.W. (2d) at p. 895):

> "Bearing in mind that the statute is concerned with economic policy, the only question is whether we can say in our judicial knowledge that the Legislature could not have had *any reasonable ground* for believing that there were *public considerations* for the distinction made by the statute." (Italics ours.)

How could there be "any reasonable ground" for the Court of Criminal Appeals of Texas or this Court to believe that there were "public considerations" for the gross discrimination apparent in the Texas antitrust laws where this situation exists,—a situation which we again describe for the sake of emphasizing the patent injustice thereof, as a discrimination coming within the purview of the First section of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

Farmers and ranchmen (along with all other persons and corporations), under the REVISED CIVIL STATUTES OF THE STATE OF TEXAS, 1925 (Title 126, VERNON'S TEXAS CIVIL STATUTES), are prohibited from making price-fixing agreements. STATE v. STANDARD OIL, ET AL., 103 Tex. 313, 107 S.W. (2d) 550. If the Attorney General of Texas, an elective public official, desires to institute a civil suit against such a group entering into such an agreement, he is permitted to do so; but no other public official could institute the suit. If these farmers and ranchmen were convicted, they would be subject to a fine of not less than fifty and not more than fifteen hundred dollars for each and every day during which such price-fixing agreement continued. (Article 7436, VERNON'S TEXAS CIVIL STATUTES, 1925.) All other classes of citizens are subject to the same civil statute. However, the ranchmen and farmers, making this price-fixing agreement, would not be subject to the Texas criminal antitrust statutes (Chapter 3, Title 19,

PENAL CODE), because they are expressly exempt from prosecution by Article 1642 of the PENAL CODE. All other classes of people, including appellant and those similarly situated to him, are subject, *for making like agreements*, to the pains and penalties prescribed by the penal laws of the State of Texas. Herbert Tigner, the appellant, may be sent to the penitentiary of Texas for not less than two nor more than ten years (Article 1640, Chapter 3, Title 19, PENAL CODE OF THE STATE OF TEXAS), because he conspired to fix the price of beer. A grand jury in Harris County, Texas, can indict him for this crime. The District Attorney can prosecute the case. And Tigner, if found guilty, may serve ten years in the State penitentiary for this crime. If, however, being a ranchman, he had conspired to fix the price of cattle, or being a farmer, he had conspired to fix the price of wheat, he cannot be indicted by a grand jury of Harris County, Texas; he cannot be tried by the District Attorney of that county or any other county, because he would have committed no offense against the laws of the State of Texas, as, under these circumstances, he falls in that favored and protected class guaranteed immunity by the provisions of Article 1642 of the PENAL CODE. Can this gross discrimination be justified on the grounds of any "public consideration" mentioned in the opinion of the Court of Criminal Appeals (R. 29)? Can this gross discrimination be justified on "any reasonable ground" as mentioned by the Court of Criminal Appeals in its opinion (R. 29)? There can be no reasonable grounds for such a discrimination, and there is no public consideration which justifies such an arbitrary distinction; and for that very definite reason Chapter 3, Title 19, of the PENAL CODE OF THE STATE OF TEXAS comes within the inhibition of the first section of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. *It gives an exemption to a favored class without any reasonable basis for such a classification* The exemption granted by its provision is a purely

arbitrary one, not based on any reasonable grounds or justified by any public considerations. It has been expressly condemned by the Supreme Court of the United States in the CONNOLLY case, supra, and scores of other analogous cases following this decision.

JUDGE CHRISTIAN, writing the opinion for the Court of Criminal Appeals of Texas, further says (132 S.W. (2d) at p. 896):

> "The necessity for the enactment of legislation designed to stabilize the prices of agricultural products and thereby promote the public interest grew out of intolerable economic conditions of which judicial notice has been taken by the courts of various States of the Union" (R. 29).

After reviewing to some extent the legislative and judicial history of coöperative marketing acts (R. 29-32, incl.), JUDGE CHRISTIAN further said (132 S.W. (2d) at p. 897):

> "Presumably the Legislature was moved by economic considerations in excepting agricultural products and live stock from the provisions of the statute" (R. 32).

The Court of Criminal Appeals of Texas was simply blind to existing facts, or else it would not have made this astonishing statement as a justification for the exemption granted by Article 1642. We have pointed out that the Legislature of Texas, in the REVISED CIVIL STATUTES OF THE STATE OF TEXAS, 1925, makes illegal price-fixing contracts affecting agricultural products and live stock, while in the hands of the producer. Such contracts are not only illegal by the civil law, but the parties making such contracts are subject to the penalties prescribed by Article 7436, Title 126, VERNON'S TEXAS CIVIL STATUTES. It is clear, therefore, that economic considerations did not cause the Legislature to except farmers and stockmen from the criminal antitrust laws of Texas, be-

cause they are not excepted from the civil antitrust laws. It is clear that the Legislature did *not*, as suggested by the Court of Criminal Appeals, consider "the differences between the classes in their relation to the ultimate object of the statute" (R. 32), because there exists no difference between the classes in their relation to the ultimate object of the statute. The object of the statute is quite clear:—in this instance punishment for price-fixing and other forbidden acts. Ranchmen and farmers have the same relationship towards this object as appellant and his associates. Their only difference is a difference in occupations, in each of which price fixing agreements are illegal under the civil laws of Texas. It is impossible for any reasonable person to claim that any of the foregoing grounds, suggested in the opinion of the Court of Criminal Appeals, constitutes a reason for making the exemptions, concerning which appellant complains, because if the Legislature desired to promote the economic prosperity of farmers and stock raisers, and if the Legislature deemed that the economic welfare of these classes would be promoted by exempting them from the prohibitions and penalties of the criminal statutes, then is it not passingly strange that price-fixing contracts of farmers and stockmen are made illegal by the civil statutes? Exemption from criminal prosecution could not possibly promote their economic welfare, when their contracts were illegal under the civil statutes. To suggest such as a possible explanation appears absurd and ridiculous on its face.

The mere statement of this existing situation discloses to what lengths the Texas Court of Criminal Appeals was willing to go in upholding this exemption as a reasonable classification. It was grasping at straws which are insufficient to support the weight of any reasonable examination. How could this exemption prescribed by Article 1642 of the PENAL CODE promote the economic welfare of farmers and stockmen, when the civil statutes of Texas made illegal the contracts which the Court of Criminal Appeals of the State of

Texas says that it might have been the policy and purpose of the Legislature of Texas to foster and promote? Such a suggestion serves only to emphasize the outrage which appellant feels when he observes a state of the law under which he, a citizen of Harris County, Texas, may be indicted and confined in the penitentiary of the State of Texas for ten years for conspiring to fix the price of beer, while wealthy ranchers and stockmen in the same county can conspire to fix the price of cattle and cotton and be immune from any kind or character of prosecution under the penal laws of the State of Texas, because, forsooth, the Legislature of Texas, in its wisdom, has seen fit to grant to this politically potent class an exemption from the pains and penalties of the criminal statutes by the provision contained in Article 1642 of the PENAL CODE OF TEXAS, that "agricultural products and livestock while in the hands of the producer or raiser" shall not be the subject of criminal prosecution under this statute.

We repeat:—If it is a crime for appellant to engage in activities looking towards fixing a price for beer in Harris County, then there is and can be no logical reason why it should not be a crime for farmers and stockmen to fix the price of cattle and cotton. It will not be argued that beer, cosmetics, tooth picks, or chewing tobacco are of more importance to the public than cattle and cotton. It cannot be argued that this exemption promotes the welfare of farmers and stockmen, when the civil statutes of Texas make their price-fixing contracts illegal and subject the parties thereto to civil penalties.

Viewing the matter from any angle, one necessarily arrives at the conclusion that the classification attempted by the Legislature of Texas is a purely arbitrary classification, without any reasonable basis, and that it does not rest upon any *ground of difference* between the included and the excluded classes *which has any fair and substantial relation to the ob-*

ject of the legislation. (See R. 27 for statement of rule by Court of Criminal Appeals.)

This case comes within the doctrine recently announced (May 24, 1937) by the Supreme Court of the United States, in the case of HARTFORD STEAM BOILER INSPECTION & INSURANCE COMPANY, ET AL., v. HARRISON, INSURANCE COMMISSIONER, 57 Sup. Ct. Rep. 838, 301 U.S. 459, 462, 81 L. Ed. 1223, 1226), wherein the court said:

> "Despite the broad range of the State's discretion, it has a limit which must be maintained if the constitutional safeguard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture. Borden's Co. v. Baldwin, 293 U.S. 194, 209. They cannot stand as reasonable if they offend the plain standards of common sense. * * *
>
> "It is idle to elaborate the differences between mutual and stock companies. These are manifest and admitted. But the statutory discrimination has no reasonable relation to these differences."

This language of the Supreme Court of the United States is more strongly applicable to the facts in this case, if possible, than it was in the situation which was presented to the court in the case wherein this language was used. JUDGE CHRISTIAN, writing in this case for the Court of Criminal Appeals of Texas, points out that farmers and stockmen live in the country, that they have few opportunities and slight facilities for impairing competition and controlling prices, that supervening economic conditions since 1902 have brought poverty to this class of people and prosperity to others,—these are the differences, so JUDGE CHRISTIAN says, which justify this exemption.

We point out in the first place, that mere differences between classes are not sufficient to justify class discrimination. Of course, the Legislature of Texas can classify; but the classification must be reasonable, not arbitrary, and must rest

upon *some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similary circumstanced shall be treated alike.* Capricious and arbitrary classifications, having no reasonable relation to the object of the legislation, are illegal under the FOURTEENTH AMENDMENT. These rules are axiomatic. The difficulty arises when we come to apply them to concrete facts. We submit, however, that no difficulty should arise in this case, because: (1) the exact question has been decided by this Court in the CONNOLLY case, supra; and (2) it is clear that the alleged differences between the "included" and the "excluded" classes, pointed out in the opinion of the Court of Criminal Appeals (R. 11-33, incl.), are either fanciful conjectures or clearly have no reasonable relation to the object of this legislation. Many people carry on their business in the country besides farmers and stockmen. Many business men have as little opportunity to suppress competition as farmers and stockmen. Many people are as poor as farmers and stockmen. These alleged differences between the exempt and included classes, pointed out in the opinion of JUDGE CHRISTIAN, are not the kind and character of differences which justify discriminatory legislation at which the equality-provision of the FOURTEENTH AMENDMENT is aimed. When we see that farmers and stockmen are forbidden by the civil law to make price-fixing contracts, we cannot believe that the Legislature made this exemption from the penal law in order to improve the economic situation of farmers and stockmen; and the mere fact that more farmers and stockmen live in the country than live in the city, and the mere fact that they as a group may not have the same opportunities and facilities for impairing competition and controlling prices as some other classes of businessmen, are differences insufficient to justify the attempted classification, which obviously does not rest "upon any ground of difference having a fair and substantial relation to the object" of the criminal antitrust statutes.

Without further elaboration upon the proposition that the CONNOLLY case is decisive of the issue involved in this appeal, and that the principle of law therein announced, as applied to the facts herein, is sound and logical and should not be overruled by this Court, we simply refer the Court to a few of the leading cases which have followed the CONNOLLY case and applied to different sets of facts the principle of law therein announced: TRUAX v. CORRIGAN, 257 U.S. 312, 66 L. Ed. 254, 42 Sup. Ct. Rep. 124; POWER MANUFACTURING CO. v. SAUNDERS, 274 U.S. 490, 71 L. Ed. 1165, 47 Sup. Ct. Rep. 678; QUAKER CITY CAB CO. v. PENNSYLVANIA, 277 U.S. 389, 72 L. Ed. 927, 48 Sup. Ct. Rep. 553; LIGGETT CO. v. BALDRIDGE, 278 U.S. 105, 73 L. Ed. 204; SMITH v. CAHOON, 283 U.S. 553, 75 L. Ed. 1264; FROST v. CORPORATION COMMISSION, 278 U.S. 515, 73 L. Ed. 483; GULF, C. & S. F. RY. CO. v. ELLIS, 165 U.S. 150, 41 L. Ed. 666; IN RE OPINION OF JUSTICES, 211 Mass. 618.

Argument

II.

The opinion of the Court of Criminal Appeals of Texas (R. 29-32) contains an elaborate defense of the validity of coöperative marketing statutes. A straw man is thus set up to the end that it may be readily and surely demolished. We make no complaint in this case to the effect that *bona-fide coöperative* marketing statutes create such exceptions to State antitrust statutes as to bring such last named statutes within the condemnation of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. The authorization of *bona fide* coöperatives to handle the *marketing of agricultural products and livestock* is clearly not such class legislation as to come within the condemnation of Section 1 of the FOURTEENTH AMENDMENT. This is a vastly different thing

from that which the State of Texas has attempted in the enactment of Chapter 3, Title 19, PENAL CODE OF THE STATE OF TEXAS, 1925. Here, price-fixing agreements, declared by civil law to be illegal, are given immunity merely because they relate to cows and cotton and the like rather than to beer and buttons and the like; those who make such agreements with reference *to the former* are still good citizens, so far as the criminal laws of Texas are concerned; those who make such agreements with reference *to the latter* are criminals who may be required to serve ten years in the State penitentiary. State policy, as reflected by civil statutes, condemns both kinds of agreements, but the State criminal statutes gives an exemption to the politically powerful, our farmers and stockmen, and prescribe severe penalties for all others similarly circumstanced, except as to political potency. The Texas law goes even further:—Farmers and stockmen can fix the price of agricultural products and livestock while in their hands; if others, not farmers or stockmen, fix this price, under the same circumstances, they are criminals. Appellant is forbidden to do what farmers and stockmen can do with impunity. No comfort for the State can be secured, under these circumstances, from the cases referred to in the opinion of the Court of Criminal Appeals on pages 30 to 32, incl., of the Record. LIBERTY WAREHOUSE CO. v. BURLEY, T. G. M. ASSO., 276 U.S. 71, 72 L. Ed. 473, cannot be used as authority to support an attempted classification as fanciful as that disclosed by this record. THE CONNOLLY case has uniformly been held inapplicable to *bona fide* coöperative organizations. MR. JUSTICE MCREYNOLDS, who wrote the opinion for the Court in the LIBERTY WAREHOUSE COMPANY case (276 U.S. 71, 91), said:

> "Connolly v. Union Sewer Pipe Co., 184 U.S. 540, is much relied upon. But there the circumstances differed radically from those here presented; and always to de-

termine whether equal protection is denied there must be consideration of the peculiar facts. Connolly resisted judgment for the purchase price of pipe upon the ground that the Union Company, the vendor, belonged to a combination or trust forbidden by an Illinois statute. The statute defined a trust, made participation therein criminal, and directed that those who purchased articles from an offending member should not be held liable for the price. Section 9 declared—'The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser.' This court held that because of the exemption the Union Company was denied the equal protection of the law. It was forbidden to do what others could do with impunity. Here the situation is very different. The questioned statute undertakes to protect sanctioned contracts against any interference—no one could lawfully do what the Warehouse Company did."

The significant words in the LIBERTY WAREHOUSE COMPANY case, which is relied upon by the Court of Criminal Appeals of Texas (R. 31), are these (276 U.S. 97):

> "The question is whether restrictions of the statute have reasonable relation to a proper purpose."

To what *proper* purpose could the exemptions of Article 1642 relate when you bear in mind that it could not possibly be "intended to encourage agriculture," as mentioned by JUSTICE MCREYNOLDS in the LIBERTY WAREHOUSE COMPANY case, because the making of price-fixing contracts by farmers and stockmen is condemned by the civil statutes which provide civil penalties therefor. No reason in the world can be offered for the exemption except that the Legislature did not want the *criminal law* to operate equally upon all who are similarly circumstanced,—an illegal purpose under the provisions of the FOURTEENTH AMENDMENT which guarantees equal protection of the law and strikes down as invalid

those State laws which contain clear discriminations having no reasonable relation to the object of the statute.

The Court of Criminal Appeals of Texas, in its opinion which is shown on pages 11-33 of the Record, not only errs in trying to justify its holding by reference to coöperative marketing decisions, but it commits an equally fatal error by attempting to rest its decision upon certain tax cases, such as AMERICAN SUGAR REFINING CO. v. LOUISIANA, 179 U.S. 89, 45 L. Ed. 102; COX v. TEXAS, 202 U.S. 446, 50 L. Ed. 1099; and others of a like nature. MR. JUSTICE HOLMES delivered the opinion in the case of COX v. TEXAS, supra, and in the course of his opinion (202 U.S. at p. 450), said:

> "The main argument addressed to us was rested on the notion that the statutes discriminate unconstitutionally between two classes of persons in the State, naturally existing there, as in Connolly v. Union Sewer Pipe Co., 184 U.S. 540, there was a discrimination with regard to trusts in favor of producers and raisers of agricultural products and live stock. This argument seems to us a fallacy. Farmers and stock raisers are classes naturally existing in the community, carrying on distinct callings and not likely to be engaged in anything else. Hence, although farmers and stock raisers equally with others were prohibited from forming trusts for other purposes, to permit them to form trusts in their regular business was practically and in fact to discriminate between two classes and others. The case was discussed throughout on the footing of classification. But, so far as we know, there is no natural distinction of classes among liquor sellers—one class selling their own domestic wines alone, another selling all intoxicants except domestic wines. The statutes regulate the doing of certain things which presumably all liquor sellers would prefer to be free to do. Therefore, whatever other objections there may be to them they do not deny the equal protection of the laws by forbidding without justification to one what they permit to another class."

It appears, therefore, very clearly that MR. JUSTICE HOLMES recognized the distinction in the statement of facts discussed in COX v. TEXAS, supra, and the statement of facts which was discussed in the CONNOLLY case, supra. However, this Court has stated time and again that in tax cases, there is a broader power of classification than in some other exercises of legislation. The following was the language of the court in CITIZENS' TELEPHONE CO. v. FULLER, 229 U.S. 322, 329, 57 L. Ed. 1206, 1213:

> "It may therefore be said that in taxation, there is a broader power of classification than in some other exercises of legislation."

And in CORNELIUS BILLINGS, ET AL., v. ILLINOIS, 188 U.S. 97, 102, 47 L. Ed. 400, 403, this Court further said:

> "On the other hand, the taxing power of a State is one of its most extensive powers. It cannot be exercised upon persons grouped according to their complexion. It can be exercised if they are grouped according to their occupations. A State may regulate or suppress combination to restrict the sale of products. The power cannot be exercised to forbid combinations among those who buy products, and permit combinations among those who raise or grow products. [CONNOLLY v. UNION SEWER PIPE CO.] 184 U.S. 540, 46 L. Ed. 679, 22 Sup. Ct. Rep. 43. And yet, exercising its taxing power, it has been decided that a State may make that discrimination. [AMERICAN SUGAR REFINING CO. v. LOUISIANA] 179 U.S. 89." (Names of Authorities Supplied.)

It will be noted that in the case last cited, this Court directly recognized the difference between classification for taxation and classifications for other purposes, and expressly holds that the AMERICAN SUGAR REFINING COMPANY case, supra, relied upon by the Court of Criminal Appeals of Texas (R. 31), is not in conflict with CONNOLLY v. UNION SEWER

PIPE COMPANY, the authority upon which appellant in this case primarily relies.

The Court of Criminal Appeals of Texas, in support of its decision upholding the validity of the criminal antitrust statutes of Texas, refers to certain early decisions of the appellate courts sustaining civil statutes of Texas and Tennessee, containing exemptions substantially the same as those contained in the PENAL CODE OF TEXAS, 1925. These include such cases as ANHEUSER-BUSCH BREWING ASSOCIATION v. HOUCK, 27 S.W. 692; HOUCK v. BREWING ASSOCIATION, 88 Tex. 184; WATERS-PIERCE v. STATE, 44 S.W. 936; and STATE v. SCHLITZ BREWING COMPANY, 59 S.W. 1033 (Tenn.) (R. 17-18, 20). All of these cases were decided prior to the decision of the Supreme Court of the United States in the case of CONNOLLY v. UNION SEWER PIPE COMPANY, 184 U.S. 539, and were overruled by that decision, as was expressly recognized by the Supreme Court of the State of Texas in the case of STATE v. COMPRESS COMPANY, 95 Tex. 603 (R. 19). The only other cases of any importance cited by the Court of Criminal Appeals in Texas in support of its judgment are the cases of CARROLL v. GREENWICH INSURANCE COMPANY, 199 U.S. 401, 50 L. Ed. 246; PATSONE v. COMMONWEALTH OF PENNSYLVANIA, 232 U.S. 138, 58 L. Ed. 539; OZAN LUMBER COMPANY v. UNION COUNTY NATIONAL BANK, 207 U.S. 251, 52 L. Ed. 195; WELCH COMPANY v. NEW HAMPSHIRE, 306 U.S. 79, 83 L. Ed. 500; DOMINION HOTEL COMPANY v. ARIZONA, 249 U.S. 265, 63 L. Ed. 597; and a few other authorities which the court says (R. 24) are also instructive and which are cited without comment. None of these cases supports the conclusions of the court. None of them overrules, modifies or limits the doctrine announced in the CONNOLLY *case*. For example, in the case of CARROLL v. GREENWICH INSURANCE COMPANY, supra, this Court was considering the validity of an Iowa statute, whereby fire insurance companies were prohibited

from combining to fix insurance rates or commissions paid agents. JUDGE CHRISTIAN, who wrote this opinion, evidently overlooked the fact that the State of Iowa had a general anti-trust act, prohibiting combinations among any business engaged in domestic commerce; and hence, as the court pointed out, the law with reference to fire insurance companies was merely in furtherance of this general statute and did not create a discrimination, since all were prohibited from doing that which fire insurance companies, by a special statute, were prohibited from doing. In the CARROLL case, supra, one of the principal authorities cited is the case of OTIS v. PARKER, 187 U.S. 606, 47 L. Ed. 323. This last named case was decided on January 5, 1903, by practically the same court which decided the CONNOLLY case. The opinion was written by MR. JUSTICE HOLMES, who was appointed to the court on December 8, 1902, taking the place of HORACE GRAY, Associate Justice, who died September 15, 1902, and who did not participate in the decision of the CONNOLLY case. OTIS v. PARKER dealt with a provision in the California constitution which provided that "all contracts for the sales of shares of capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction." MR. JUSTICE HOLMES, in writing the court's opinion holding that such a provision was not contrary to the first section of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, said (187 U.S. 610):

> "If stopping the purchase and sale of stocks on margin would stop the gambling which it was desired to prevent, it was proper for the people of California to go no further in what they forbade. The circumstances disclose a reasonable ground for the classification, and these distinguish the case from Connolly v. Union Sewer Pipe Company, 184 U.S. 540."

It will be thus observed that the doctrine proclaimed in the CARROLL case, and the others last mentioned as being those cases principally relied upon by the Court of Criminal Appeals of Texas, relates back to the case of OTIS v. PARKER, which expressly recognizes the sound principle of law announced in the CONNOLLY case. Certainly no one can contend that such cases overruled the decision of the Supreme Court of the United States in the CONNOLLY case. It is significant that MR. JUSTICE HOLMES in numerous opinions written by him,—from two of which we have already quoted,—recognized as sound the decision of this Court in the CONNOLLY case. We regard this as rather significant, because it would indeed be strange to see overruled a case which has the approval of practically all members of the court, over a period of four generations, insofar as such can be determined from the opinions which have discussed the case in the consideration of analogous factual situations. No judge of this Court, liberal or conservative, if popular classifications may be used, has seen fit to criticize, much less overrule, this decision, as the Court of Criminal Appeals of Texas has done.

The next case relied upon by the Court of Criminal Appeals is PATSONE v. COMMONWEALTH OF PENNSYLVANIA, supra (R 21), in which this Court sustained a statute of Pennsylvania, which made it unlawful "for any unnaturalized foreign born resident to kill any wild bird or animal except in defense of personal property, and to that end makes it unlawful for such foreign born person to own or be possessed of a shotgun or rifle; with a penalty of $25.00 and a forfeiture of the gun or guns." The opinion in this case was written by MR. JUSTICE HOLMES, who wrote the opinion in OTIS v. PARKER, upon which we have already commented. Counsel for Patsone did not cite, in his argument, the CONNOLLY case. The statute was manifestly designed to protect the State's natural resources from aliens, a power universally recognized (GEER v. CONNECTICUT, 161 U.S. 519, 40 L. Ed.

793), and the statute furthermore designated a particular class as defining those producing the evil, but from that class *none was exempted*. The rule announced in this case is merely that the State need not so broaden its classification as to cover "the whole field of possible abuses," the same principle mentioned in the case of OTIS v. PARKER, supra, wherein JUSTICE HOLMES expressly recognized the distinction between such a rule and that rule announced in the CONNOLLY case.

It is not deemed necessary to analyze all of the cases, above listed, as being those principally relied upon by the Court of Criminal Appeals, for it will be found in each instance that none of them militates against the principle of law announced in the CONNOLLY case. Most of them refer to the CONNOLLY case and distinguish it, as was done by MR. JUSTICE PECKHAM, who wrote the opinion for a unanimous court in the case of OZAN LUMBER COMPANY v. UNION COUNTY NATIONAL BANK OF LIBERTY, supra, strongly relied upon by the Court of Criminal Appeals of Texas (R. 21). MR. JUSTICE PECKHAM said (207 U.S. 257):

> "The case of Connolly v. Union Sewer Pipe Co., 184 U.S. 540, one of the cases cited by the circuit court, is not, in our opinion, applicable. The statute did not apply to agricultural products or livestock while in the hands of the producer or raiser. It was held that this exemption rendered the statute void, as denying to persons within the jurisdiction of the state the equal protection of the laws. The statute was held to create a classification of an arbitrary nature, applicable to large numbers of people, and yet not based upon any reasonable ground. Those who were exempted from its provisions were numerous and stood practically in the same relation to the subject matter of the statute as did the other class upon whom the statute acted, and no valid reason could be given why, if one were included, the other should be exempted. The same reasons applied to all the classes, and should have led to the same results with regard to all. There was no room for a proper or fair discrimination."

Without prolonging this brief with a detailed analysis of all of the cases relied upon by the Court of Criminal Appeals of Texas, in upholding this statute, it is sufficient to say that like those heretofore analyzed, they in no sense overrule the CONNOLLY case; and none of them can be remotely considered as authority for justifying the gross discrimination created by Article 1642 of the REVISED PENAL CODE, 1925.

In this opinion of the Court of Criminal Appeals (R. 30), JUDGE CHRISTIAN refers to the enactment by the several states of coöperative marketing acts. We do not challenge the right of the State to promote the welfare of the agricultural class by the enactment of *bona fide* coöperative marketing laws. JUDGE CHRISTIAN mentions the enactment by the Congress of the CLAYTON ACT, the CAPPER-VOLSTEAD ACT, and the CO-OPERATIVE MARKETING ACT of July 2, 1926 (R. 30), all being evidence of the urge for legislation to promote prosperity in agricultural pursuits. It is perhaps not amiss to point out that on December 4, 1939, in the case of UNITED STATES OF AMERICA v. THE BORDEN COMPANY, ET AL., 84 L. Ed. 143 (advance sheets), this Court held that the AGRICULTURAL ADJUSTMENT ACT, as reënacted and amended by the AGRICULTURAL MARKETING AGREEMENT ACT, affords no ground for construing the SHERMAN ACT as inapplicable to a price-fixing conspiracy. The arm of the SHERMAN LAW was strong enough to reach price-fixers who sought to justify their activities by authorization contained in the CLAYTON ACT, the CAPPER-VOLSTEAD ACT, the AGRICULTURAL ADJUSTMENT ACT OF 1933, as amended in 1935 and as reënacted and amended by the AGRICULTURAL MARKETING AGREEMENT OF 1937. The evidenced desire of the Legislature or the Congress to help and assist farmers and stockmen cannot be used as a reason to justify gross discriminations in Texas Penal Statutes.

It is not believed that counsel for the State in this case can justify the reasoning of JUDGE CHRISTIAN in his opinion, when he says that (132 S.W. (2d) 897):

> "The Legislature, in making the classification, was entitled to consider prevailing economic conditions and the differences between the classes in their relation to the ultimate object of the statute, which was the promotion of the general prosperity" (R. 32).

The primary and fundamental reason why this exemption cannot be justified on any such basis is that from any conceivable viewpoint, the exemption in Article 1642 could not possibly have this result, because the civil antitrust statutes made the price-fixing agreements of farmers and stockmen illegal, and provided appropriate civil penalties for the making of such agreements; and therefore, under such conditions, the exemption of this class from the operation and effect of the criminal antitrust statutes could not be justified on the grounds that such was in aid of State policy, when State policy, as declared by the civil statutes of Texas, condemned such contracts as were exempted by Article 1642 from the operative effect of the Texas criminal antitrust statutes.

JUDGE CHRISTIAN concludes the opinion by saying (132 S.W. (2d) 897):

> "In the difference of these situations, and in other differences which will occur to any reflection, might not the Legislature see difference in opportunities and powers between the classes in regard to the prohibited acts? That differences exist cannot be denied. To describe and contrast them might be invidious" (R. 33).

We certainly deny these statements and say in reply thereto *that no reasonable person could possibly conceive of any substantial differences, having any reasonable relation to the object of this legislation*, between the classes excluded by Article 1642 and the other classes coming within the condemnation of Articles 1632, 1633, 1634, 1635 and 1637 of Chapter 3, Title 19, of the PENAL CODE OF THE STATE OF TEXAS, 1925. There might be some possible justification for this statement if

the policy of the State of Texas were to exempt from all anti-trust legislation the business of farmers and stockmen, such being done on the theory that it would promote the general welfare and prosperity of this particular class. Counsel for appellant seriously doubts the right of the State of Texas to do this. This Court declared, in the CONNOLLY case, that it could not be done in Illinois. Here the State of Texas undertakes to go further with its discrimination than did the State of Illinois. Certainly the equal protection clause of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES is violated when all price-fixing is made a felony except price-fixing with reference to agricultural products or livestock while in the hands of the producer or raiser, particularly when at the same time the criminal law grants this exemption, the civil antitrust statutes of the same State make such contracts illegal and provide for large penalties to be assessed against those who engage in price-fixing activities with respect to these commodities, even though they still be in the hands of the producer or raiser. STATE OF TEXAS v. STANDARD OIL COMPANY, 130 Tex. 313, 107 S.W. (2d) 550. Clearly the exemption, under these circumstances, cannot even remotely tend to promote the economic welfare of either the stockman or the farmer. The State of Texas, by its laws, has created a more glaring discrimination than that which was presented in the factual situation discussed in the CONNOLLY case.

We submit that the facts in this case bring appellant within the rule unanimously approved by this Court in the case of SMITH v. CAHOON, 283 U.S. 553, 567, wherein the court, speaking through CHIEF JUSTICE HUGHES, said:

> "'Such a classification is not based on anything, having relation to the purpose for which it is made.' Air-Way Electric Corp. v. Day, 266 U.S. 71, 85; Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 563, 564; Southern Ry. Co. v. Greene, 216 U.S. 400, 417; Truax v. Cor-

rigan, 257 U.S. 312, 332, 333; Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 37."

In this case a distinction was sought to be made between those who carry for hire farm products and those who carry for hire bread or sugar or other useful commodities. Unanimously the court declared the classification to be purely arbitrary. The gross discrimination in the case now before this Court is even more glaring than that declared illegal in the foregoing case.

Argument

III.

There seems to be no very material difference between JUDGE CHRISTIAN, writing for the Court of Criminal Appeals of Texas and counsel for the appellant in their understanding as to the rules of law applicable to the right of classification under the provisions of Section 1 of the FOURTEENTH AMENDMENT. Counsel for appellant do not take issue with the general rules laid down by the Supreme Court in LINDSLEY V. NATURAL CARBONIC GAS COMPANY, 220 U.S. 61, 55 L. Ed. 369, or the other authorities listed in the opinion of the Court of Criminal Appeals, as shown on page 27 of the Record. The rule of law is quite clear. It is the application of the rule which creates our disagreement. All agree that the State's power to classify is limited under the provisions of Section 1 of the FOURTEENTH AMENDMENT to the extent that the classification must be on some reasonable basis and not purely arbitrary, and that the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. Can it be said that appellant is accorded "the equal protection" of the criminal laws of Texas, when it appears that he may be sent

to the penitentiary of Texas for ten years for an alleged conspiracy to fix the price of beer, when at the same time it is unlawful for a ranchman in Harris County, Texas, to fix the price of livestock, when in his possession, but nevertheless such ranchman is not subject to the aforesaid criminal statute for no other reason, it appears, than because of the fortuitous circumstance that he is a ranchman and not engaged in some other business? Are classifications reasonable when the only ground of difference between the "included class" and the "excluded class" is that they pursue different occupations? Whoever gives an affirmative answer to this inquiry must wholly disregard that part of the well recognized rule of classsification, that the classification must rest upon some ground of difference, HAVING A FAIR AND SUBSTANTIAL RELATION TO THE OBJECT OF THE LEGISLATION. If price-fixing is detrimental to the public, and if all price-fixing agreements are illegal, then what difference does it make whether the price-fixer is a farmer or a druggist? This difference has no fair and substantial relation to the object of the law, to wit, preventing price-fixing; and hence a classification based thereon is illegal under the provisions of the first section of the FOURTEENTH AMENDMENT. It seems to counsel for appellant that this proposition is so clear and obvious as to hardly merit serious discussion; and counsel cannot believe that this Court will sanction the legislation of a State which is made to apply to particular classes on any such basis of differentiation as that which appears beyond dispute in this case.

The following additional authorities are cited to show how attempted classifications, less arbitrary than that made by the laws of the State of Texas in this case, were attempted but were not permitted by this Honorable Court, because they were a violation of Section 1 of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: HARTFORD INSURANCE CO. v. HARRISON, 301 U.S. 459, 57 Sup. Ct. Rep. 838; SMITH v. CAHOON, 283 U.S. 553, 75 L. Ed. 1264;

TRUAX v. CORRIGAN, 257 U.S. 312, 66 L. Ed. 254, 27 A.L.R. 375; FROST v. CORPORATION COMMISSION, 278 U.S. 515, 73 L. Ed. 483; TRUAX v. RAICH, 239 U.S. 33, 60 L. Ed. 131; POWER MANUFACTURING CO. v. SAUNDERS, 274 U.S. 490, 71 L. Ed. 1165; COTTING v. GODARD, 183 U.S. 79, 46 L. Ed. 92; GULF, C. & S. F. RY. CO. v. ELLIS, 165 U.S. 150, 41 L. Ed. 666, 17 Sup. Ct. Rep. 255; YICK WO v. HOPKINS, 118 U.S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064; MISSOURI v. LEWIS, 101 U.S. 22, 25 L. Ed. 989; DUNCAN v. MISSOURI, 152 U.S. 377, 38 L. Ed. 485, 14 Sup. Ct. Rep. 570.

Conclusion

The Constitution of the State of Texas contains in Article One a Bill of Rights in which it is provided that "all freemen, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." The decision of the Court of Criminal Appeals of Texas in this case has made a mockery of this provision in the Bill of Rights of the Texas Constitution. An humble citizen of Texas, protecting himself through the means of a writ of habeas corpus, as authorized by Section Twelve of this Bill of Rights, has exhausted every opportunity and made every possible effort to secure his liberty through the courts of his State. This prayer for relief has been denied by the court of last resort in Texas. He comes now to this tribunal to invoke its protection in one of the great rights which he enjoys as a citizen of the United States,—a right guaranteed by the first section of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." He claims this right as a citizen of the United States, but it is a valuable right which is extended to every person within the jurisdiction of a State, irrespec-

tive of his citizenship. Appellant feels that, under the conditions reflected by this record, he is not accorded the equal protection of the laws of the State of Texas, and that the Court of Criminal Appeals of Texas, in its opinion, has merely rendered lip service to this important constitutional guarantee. Clearly, he feels, the State of Texas, contrary to the Bill of Rights in the STATE CONSTITUTION, and contrary to the provisions of Section 1 of the FOURTEENTH AMENDMENT TO THE UNITED STATES' CONSTITUTION, is extending to a class of its citizens special privileges which are denied to appellant. Stockmen and farmers of Texas, who make illegal price-fixing contracts with reference to agricultural products and livestock while in their hands, are exempt from prosecution under the criminal laws of the State of Texas, because of the provisions of Article 1642 of the PENAL CODE. The alleged price-fixing conspiracy of this appellant is made illegal by the laws of the State of Texas; but appellant, unlike his fellow citizens who belong to the excepted class of farmers and stockmen, can be sent to the penitentiary of Texas for a period of ten years, because he participates in the making of an illegal agreement. Appellant feels that it is clearly obvious that this is not the equality of law which the decisions of this high tribunal guarantee. This is class legislation which bears all of the earmarks of favoritism and unwarranted discrimination. The equal protection clause of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES becomes a meaningless jargon of words, if it be not effective to correct a condition under which appellant can be made to serve ten years of his life in the State penitentiary for doing that for which his neighbor, who does the identically same thing, cannot be called to account under the criminal laws of his State, because appellant does not happen to follow the vocation pursued by his neighbor, which is the only real difference upon which the State, defending this exemption, bases

a claim of reasonable classification within the meaning of the first section of the FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

WHEREFORE, premises considered, appellant prays that the judgment of the Court of Criminal Appeals of Texas be reversed, and that this Honorable Court enter an order directing the said Court of Criminal Appeals of Texas to set aside the judgment of the Criminal District Court No. 2 of Harris County, Texas, remanding appellant to the custody of Norfleet Hill, Sheriff of Harris County, Texas, and further directing said court to enter an order discharging the said appellant from the custody of said officer, as prayed for by appellant in his original application for a writ of habeas corpus in Cause No. 49,974 on the docket of the Criminal District Court No. 2 of Harris County, Texas.

Respectfully submitted,

WILLIAM A. VINSON,
CHARLES I. FRANCIS,
Attorneys for Herbert Tigner, Appellant,
Eleventh Floor, Esperson Building,
Houston, Texas

Of Counsel:
VINSON, ELKINS, WEEMS & FRANCIS,
Esperson Building, Houston, Texas